Office-Supreme Court, U.S.
FILED
AUG 2 1984
ALEXANDER L. STEVAS,
CLERK

84-222

NO.

In the Supreme Court of the United States

OCTOBER TERM, 1984

ARTHUR W. STURGEON

Plaintiff,

versus

STRACHAN SHIPPING COMPANY

Defendant/Third-Party Plaintiff/Appellee-Petitioner

versus

BANKERS & SHIPPERS INSURANCE COMPANY OF NEW YORK

Third-Party Defendant/Appellant-Respondent

versus

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY

Third-Party Defendant/Appellee-Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Laurence E. Larmann
Hailey, McNamara, Hall, Larmann & Papale
3121 21st Street — P. O. Box 8288
Metairie, Louisiana 70011-8288
Telephone: (504) 834-9252
Attorneys for Strachan Shipping Company & American Mutual Liability Insurance Company

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED

1. Whether the Fifth Circuit Court of Appeals erred in overruling the case of *McDaniels v. Great Atlantic & Pacific Tea Co., Inc.*, 602 F.2d 78 (5th Cir. 1979).

2. Whether the Court erred in determining that under the facts Strachan Shipping Company was not a borrower within the meaning of the terms of the policy of insurance issued by Bankers & Shippers Insurance Company of New York to Arthur W. Sturgeon.

3. Whether the Honorable Fifth Circuit Court of Appeals erred in failing to find that the clause in question in the Bankers & Shippers Insurance Company of New York's policy was ambiguous and as such should have been liberally construed to extend coverage to permissive users.

4. Whether the Honorable Fifth Circuit Court of Appeals erred in granting an En Banc hearing in this diversity case which involved a question of Louisiana law.

TABLE OF CONTENTS

Page

Questions Presented i
Table of Contents ii
Table of Authorities iii
Prayer 1
Opinions Below 2
Jurisdiction 2
Existence of Proper Jurisdiction Below 2
Statement 2
Reasons for Granting the Petition 4
Conclusion 7
Proof of Service 8

TABLE OF CONTENTS(Con't) Page

APPENDIX A — *Arthur Sturgeon v. Strachan Shipping Co.*, 731 F.2d 255 (5th Cir. 1984) A-1
APPENDIX B — *Arthur Sturgeon v. Strachan Shipping Co.*, 698 F.2d 798 (5th Cir. 1983) A-13
APPENDIX C — Original and Amending Judgments of the District Court A-18
APPENDIX D — 28 U.S.C. §1254(1) A-30
APPENDIX E — 28 U.S.C. §1332 ..... A-31
APPENDIX F — Bankers & Shippers Loading and Unloading Clause A-32
APPENDIX G — Decision of the Fifth Circuit granting an En Banc Hearing A-33
APPENDIX H — The remanding of the Case back to the original panel A-35
APPENDIX I — The Certification to the Supreme Court of Louisiana A-37
APPENDIX J — The Denial of the Certification by the Supreme Court of the State of Louisiana A-42
APPENDIX K — Denial of Petition for Rehearing by Strachan Shipping Company and American Mutual Liability Insurance Company A-44

TABLE OF AUTHORITIES

Cases **Page**

Canal Insurance Co. v. Brooks, 201 F.Supp. 124 (W.D. La. 1962) *aff'd*, 309 F.2d 751 (5th Cir. 1962) 6

McDaniels v. Great Atlantic & Pacific Tea co., et al., 602 F.2d 78 (5th Cir. 1979) 5, 6, 7

Rachal v. Union National Life Insurance Co., 184 So.2d 775, 779 (La.App. 3rd Cir. 1966) 6

Sparkman v. Highway Insurance Co., 256 F.Supp. 197, 203 (W.D. La. 1967) 6

Travelers Indemnity Co. v. Gulf Weighing Corporation, 352 F.Supp. 335, 334 (E.D. La. 1972) 6

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ARTHUR W. STURGEON

Plaintiff,

versus

STRACHAN SHIPPING COMPANY

Defendant/Third-
Party Plantiff/
Appellee-Petitioner

versus

BANKERS & SHIPPERS INSURANCE
COMPANY OF NEW YORK

Third-Party Defendant/
Appellant-Respondent

versus

AMERICAN MUTUAL LIABILITY
INSURANCE COMPANY

Third-Party Defendant/
Appellee-Petitioner

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PRAYER

Petitioners pray for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review the Judgment of that Court entered on May 3, 1984.

OPINIONS BELOW

The opinion of the En Banc United States Court of Appeals for the Fifth Circuit (Appendix A) is reported at 731 F.2d 255 (5th Cir. 1984). The opinion of the United States Court of Appeals for the Fifth Circuit panel (Appendix B) is reported at 698 F.2d 798 (5th Cir. 1983). The opinion of the United States District Court for the Eastern District of Louisiana (Appendix C) is unreported.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1). (See Appendix D).

EXISTENCE OF PROPER JURISDICTION BELOW

Jurisdiction based on diversity pursuant to 28 U.S.C. §1332. (See Appendix E).

STATEMENT

Plaintiff, Arthur W. Sturgeon filed suit in the United States District Court for the Eastern District of Louisiana against Strachan Shipping Company, alleging to have incurred certain injuries on the Robin Street Wharf in New Orleans, Louisiana, on March 4,

1979. Mr. Sturgeon alleges that the injuries that he incurred were due to the negligence of a forklift operator or operators who were employed by Strachan Shipping Company and who were in the process of unloading a flat-bed truck owned by Mr. Sturgeon and leased to his employer, Pre Fab, Inc. Strachan Shipping Company filed an Answer to plaintiff's Petition and in turn filed a Third-Party Claim against Bankers & Shippers Insurance Company of New York for indemnity, costs and attorneys' fees claiming to be an insured under Section 2C1 of the policy of insurance issued by Bankers & Shippers to Pre Fab, Inc. (Appendix F). Bankers & Shippers Insurance Company denied that they were insurers of Strachan Shipping and in addition filed a Cross-Claim against American Mutual Liability Insurance Company alleging that the American Mutual Liability Insurance Company was in fact the insurer of Strachan Shipping Company, and Bankers & Shippers' insurance policy would be excess to the American Mutual policy. Bankers & Shippers alternatively asked for contribution as among joint tort-feasors in the event the Court decided that Bankers & Shippers and American Mutual Insurance Company were co-insurers. On the morning of trial, a settlement agreement was reached whereby the plaintiff's case was settled for a total of $150,000.00, with the coverage question raised by the Third-Party Complaints to be decided by Her Honor, Judge Veronica Wicker. On January 21, 1982, a Judgment was rendered in favor of Strachan Shipping Company finding them to be an omnibus insured under the Bankers & Shippers' insurance policy. (Appendix C).

Bankers & Shippers' Third-Party Complaint against American Mutual Liability Insurance Company demanding that Bankers be declared the excess insurer and/or in the alternative, for contribution against American Mutual was dismissed. From that Judgment Bankers & Shippers filed an Appeal with the United States Court of Appeals for the Fifth Circuit.

On February 25, 1983, a three Judge panel of the United States Court of Appeals for the Fifth Circuit rendered Judgment affirming the lower Court's decision. (Appendix B). Bankers & Shippers Insurance Company of New York then applied for and was granted an En Banc hearing. (Appendix G). On August 25, 1983, the Fifth Circuit decided that it had granted a rehearing En Banc "improvidently", and remanded the case back to the three Judge panel. (Appendix H). The Fifth Circuit Court of Appeals then certified the question of whether Strachan Shipping Company was a borrower of the tractor-trailer to the Supreme Court for the State of Louisiana. (Appendix I). The Supreme Court of Louisiana refused the certification. (Appendix J). The United States Fifth Circuit Court of Appeals then heard the case En Banc, Judge Davis not participating, and on May 3, 1984 rendered a decision reversing the decision of the lower Court. (Appendix A). A rehearing was applied for and denied. (Appendix K).

REASONS FOR GRANTING THE PETITION

In reaching its decision that Strachan Shipping Company was not a borrower of the Sturgeon truck, the Honorable Court had to overrule its previous

holding in the case of *McDaniels v. Atlantic & Pacific Tea Co., et al.,* 602 F.2d 78 (5th Cir. 1979). In the *McDaniels* case which involved an accident in Louisiana, the Fifth Circuit Court of Appeals determined that the unloaders of trucks, even though they may not have been able to physically move the trucks themselves, had control over the movement of the truck in that they determine where the trucks were to be placed for unloading and when the truck could be moved. Even though they may not have been physically able to move the trucks themselves, the Court concluded that they had control over the movement of the trucks. It is submitted that the *McDaniels* definition of the term "borrower" is a sound definition and should not have been overruled. The Court in overruling the McDaniels case has determined that in order to have control of a vehicle which would render a loader and unloader a "borrower", the loader or unloader must have the power to move the truck. It is respectfully submitted that the term "control" should not require the power to move the vehicle. Control comtemplates the power to manage or direct or oversee. The wording of the Bankers & Shippers' policy clearly negates the necessity of operation of the vehicle:

> "ii. Persons Insured. Each of the following is an insured under this insurance to the extent set forth below.
>
> c. Any other person using an owned automobile or a hired automobile with the permission of the named insured provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission . . .".

The wording of this clause is at best ambiguous. It is a well settled law in the State of Louisiana that an insurance policy should be liberally construed to extend coverage to permissive users. By contrast, clauses purporting to limit coverage should be strictly construed. Any doubt as to the meaning of a disputed provision must be resolved against the insured. *Travelers Indemnity Co. v. Gulf Weighing Corp.*, 352 F.Supp. 335, 334 (E.D. La. 1972); *Sparkman v. Highway Ins. Co.*, 256 F.Supp. 197, 203 (W.D. La. 1967); *Rachal v. Union National Life Ins. Co.*, 184 So.2d 775, 779 (La.App. 3rd Cir. 1966); *Canal Ins. Co. v. Brooks*, 201 F.Supp. 124 (W.D. La. 1963) *aff'd*, 309 F.2d 751 (5th Cir. 1962).

Considering the question of whether Strachan was a borrower of the vehicle to be a question of Louisiana law, the United States Court of Appeals for the Fifth Circuit certified the question to the Louisiana Supreme Court. The Court denied certification. It is respectfully submitted that the denial by the Court indicated their concurrence in the *McDaniels* decision. Certainly if the Supreme Court had felt as though Louisiana law was in opposition or should be in opposition to the *McDaniels* decision, it would have taken some action to clarify the question and make a determination as to the definition of the term "borrower". In addition, the fact that Chief Justice Dixon did indicate that he would have granted the certificate and would have answered both questions "no". further gives credence to the position that the remaining Justices of the Louisiana Supreme Court did concur in the *McDaniels* decision. It is respectfully submitted that the United States Court of Appeals for the Fifth Circuit erred in granting an En Banc hearing and

reversing the *McDaniels* case. In so doing the Court took it upon themselves to determine a question of Louisiana law even though the Supreme Court of Louisiana had refused to do so.

CONCLUSION

Petitioners respectfully pray that this Honorable Court grant the Petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted:

LAURENCE E. LARMANN
HAILEY, McNAMARA, HALL,
LARMANN & PAPALE
3121 21st Street — P. O. Box 8288
Metairie, Louisiana 70011-8288
Telephone: (504) 834-9252

APPENDIX "A"

STURGEON V. STRACHAN SHIPPING COMPANY

United States Fifth Circuit

No. 82-3229

(May 3, 1984)

Appeal from the Unites States District Court for the Eastern District of Louisiana.

Before CLARK, Chief Judge, BROWN, GEE RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY, and HIGGINBOTHAM, Circuit Judges*.

Gee, Circuit Judge:

We are asked today to formulate the test of Louisiana law applicable in insurance suits to determine when a loader or unloader may claim omnibus coverage as a "borrower" of the vehicle under the standard loading and unloading clause of the trucking company's policy — and asked to apply that test to the prototypical facts of this case. A panel of this Court has already performed both these tasks: in *McDaniels v. Great American Atlantic and Pacific Tea Co.*, 602 F2d. 78 (5th Cir.1979), we adopted for Louisiana a test formulated by the Texas courts, *see Liberty Mutual insurance Co.*, 556 S.W.2d 242

---

* Judge Davis did not participate in this decision.

(Tex.1977), and applied it to circumstances not distinguishable in any principled way from those of the instant case to bestow coverage on the unloader as a "borrower." Today we reaffirm the *Liberty Mutual* test as Louisiana law but override *McDaniels'* interpretation of that test to hold that the unloader is not a borrower on the facts of this case.

These are not disputed. We quote the panel opinion:

> Pursuant to a contract, plaintiff Sturgeon, the owner-driver of a flatbed tractor-trailer, delivered a load of Texas cotton to defendant Strachan Shipping Company [Strachan] in New Orleans, presenting it for unloading at the time and place appointed. Arriving there, he handed over his bills of lading to the Strachan clerk, parked his rig where directed in Strachan's unloading area, and as directed readied its trailer for unloading by removing the tarpaulin and its fastenings. With this he was free to leave the area, since Strachan had complete control over the unloading process until it released the truck to Mr. Sturgeon. Although the trial court made no specific finding on the subject, Mr. Sturgeon testified without disppute that only he had right of access to his tractor, the Strachan employee-witnesses agreed, and Mr. Sturgeon does not here contend that anyone but he could move the rig one he parked it. While Strachan forklifts were unloading the bales without driving onto the trailer, a bale fell on Mr. Sturgeon.
>
> When he [Sturgeon] sued Strachan for his resulting injuries [in federal court in Louisiana, invoking diversity jurisdiction],

> Strachan third-partied Mr. Sturgeon's insurance carrier,[1] [Bankers and Shippers], claiming omnibus coverage as a "borrower" of the entire rig.

Sturgeon v. Strachan Shipping Co., 698 F.2d 798 (5th Cir.1983).

Bankers and Shippers policy reads:

> . . .Persons Insured (c) Any other person while using an owned automobile or a hired automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, but with respect to bodily injury or property damage arising out of the loading or unloading thereof, such other person shall be an insured only if he is:
>
> (1) a lessee or borrower of the automobile . . .

Bankersand Shippers contends that while the Strachan unloaders may have been covered as "permissive users" under the former standard loading and unloading clause, they are excluded from coverage by the revision limiting coverage to one unloading a hired vehicle only if he is a "borrower of the automobile. . . ." Accordingly, Bankers and Shippers denied coverage to Strachan. Bankers and Shippers cross-claimed against Strachan's insurer, American Mutual Liability Insurance Company (American Mutual) for contribution under a comprehensive

---

[1] Actually and inconsequentially for our purposes that of his employer, which provided his coverage.

general liability policy covering Strachan. This policy excluded coverage for "bodily injury — arising out of the ownership, maintenance, operation, use, *loading or unloading* of (1) any automobile — owned or operated by or rented or *loaned* to any insured — but this exclusion does not apply to the parking of an automobile on premises owned by, rented to or controlled by the named insured or the ways immediately adjoining, if such automobile is not owned by or rented or *loaned* to any insured." [2]

Finding herself bound by the *McDaniels* decision, the trial judge held that Strachan was a "borrower" under Bankers and Shippers' policy and Bankers and Shippers were therefore, as Strachan's omnibus insurer, liable for the entire claim against Strachan. [3]

Bankers and Shippers' third-party cross-claim against Strachan's insurers, American Mutual, for contribution was dismissed, the trial court reasoning logically that "borrow is the correlative of loan," so that the exclusion by the comprehensive general liability policy of "loaned" vehicles applied and Bankers was primary carrier. On Bankers and Shippers' appeal, a panel of this Court affirmed the trial

---

[1] The policy nowhere defines the term "borrower."

[2] (Emphasis added.) American Mutual also covered Strachan under a Business Automobile Policy which provided that for any covered automobile not owned by the insured, the insurance provided by this policy is excess over any other collectible insurance.

[3] All other parties were disposed of before trial. Following jury selection, the plaintiff's case was settled for $150,000, reserving defendants' rights *inter sese*. Thereafter, the case between Strachan, Bankers and Shippers, and American Mutual was tried without jury.

court, stating that McDaniels determined the result. *See Sturgeon v. Strachan Shipping Co.*, 698 F.2d 798 (5th Cir.1983) (Sturgeon I). Unlike the panel, sitting en banc we may reconsider *McDaniels* in light of Bankers and Shippers' arguments and, having done so we now adopt for Louisiana [4] the prevailing interpretation [5] of the standard "borrower" clause as a restriction of the previous "permissive user" terminology.

The seminal case construing this particular standard policy provision in our Circuit is *Liberty Mutual*, 556 S.W.2d at 243, written for the Supreme Court of Texas by then-Justice Sam Johnson, our colleague. Carefully reviewing recent developments in coverage afforded by automobile liability insurance, as reflected by the addition of the "borrowers only" limitation to the standard loading and unloading

---

[4] We confess some trepidation at rewriting Louisiana law on a point on which state courts have been completely silent. However, our effort to certify this question to the Louisiana Supreme Court met with refusal; we are thus constrained to formulate Louisiana's test.

Having taken the appeal en banc following publication of the original panel opinion, our court by order of August 25, 1983, remanded to the panel to permit certification to the Supreme Court of Louisiana. After consultation with counsel, the panel appeared an opinion seeking the assistance of that court. 721 F.2d 144 (5th Cir.1983). A month and some weeks later, the Louisiana court responded to our request as follows, 444 So.2d 1234:

February 3, 1984
Certification denied.
HTL
PFC
WFM
JLD
FAB
JCW
DIXON, C.J., would grant the answer both question with "No."

We therefore voted the appeal en banc again and dispose of it as best we can.

[5] *See Sturgeon I*, 698 F.2d at 799-800, 800 n. 35 and cases cited therein.

clause, the *Liberty Mutual* court held that whereas mere use (loading or unloading) of a vehicle sufficed to make a loader/unloader a "permissive user," both actual use *and temporary possession* of the insured's vehicle were required to render a loader/unloader a "borrower" under the amended standard clause.

The holding of *Liberty Mutual*, a Texas case, is, of course, not binding in this diversity case to which Louisiana law applies. [6] However, we find the reasoning of that case persuasive — so much so that we quote it at some length:

> The court of civil appeals defined "borrower" as "someone who has, with permission of the owner, temporary possession and use of the property of another for his own purposes." . . . Although we agree with the court of civil appeals' general definition of "borrower," we do not agree that Homette [the unloader] falls within it because there is no evidence that Homette had possession of truck and trailer rig . . . . Prior to the addition of the loading and unloading endorsement to the automobile liability policy neither the automobile policy nor the standard liability policy defined which insurer had liability coverage for injuries sustained upon the premise of one who was injured under a general liability policy during the loading and unloading of a vehicle not owned or hired by the general liability insured. This question was settled by the later addition of the loading and unloading clause: the automobile liability insurer would provide coverage for injuries sus-

tained as a result of negligence in the loading and unloading of the vehicle.... The inclusion of the loading and unloading clause expanded the coverage of the policy from that afforded by the phrase "ownership, maintenance or use...of any automobile." ...Texas has adopted the broader majority view that "loading and unloading" embraces not only the immediate transfer of the goods to or from the vehicle, but also the complete operation of transporting the goods between the vehicle and the place from or to which they are being delivered. Under the complete operation approach the coverage provided by a loading and unloading clause extended to a broad group of persons who were not employees of the owner of the vehicle; the only requisite for coverage was that they were using (unloading) the truck with the consent of the owner. [7]

General rules of construction lead us to conclude that the policy exclusion for persons who were unloaders but not "borrowers" of the vehicle was intended to limit the insurer's liability for injuries resulting from acts of

---

[6] Although the policy was issued in Texas to a Texas insured, the accident happened in Louisiana, and the Louisiana choice of law rule would apply Louisiana law to interpretation of the policy that "took effect" in Louisiana. *See Jahrman v. Valley Air Park, Inc.*, 333 So.2d 712, 713 (La.App.1976); *Sutton v. Langley*, 330 So.2d 321 (La.App.1976).

[7] Essentially the same broad coverage obtained under the "commonsense" approach adopted by the Louisiana Supreme Court in *Fertitta v. Palmer*, 252 La. 336, 211 So.2d 282, 285-86 (1968).

[8] See note 4, *supra*.

> these nonemployees of the owner of the vehicle. The purpose of an exclusion is to take something out of the coverage that would otherwise have been included in it . . . . If, as American urges, . . . [the mere act of unloading] was enough to bring Homette within the policy, the "borrower" requirement would be meaningless because one would need only to be an unloader to also be a "borrower." We decline to adopt American's construction of the policy. *While unloading is a "use" of the vehicle, the conjunction "and" in the definition of "borrower" indicates that one must also have possession of the vehicle to be a "borrower."* Possession connotes the right to exercise dominion and control over the truck and trailer. There is no evidence that Homette had this right.

Liberty Mutual, 556 S.W.2d at 244-45. (citations omitted) (emphasis added).

In subsequent cases, the Texas courts have applied the "use and possession" test of *Liberty Mututal* to bar coverage where, as here, the alleged "control" of the vehicle by the unloader was evidenced by telling the driver where to park and entering the vehicle only as necessary to remove the goods. *See, e.g., Atlantic Mutual Insurance Co. v. Gulf Insurance Co.*, 596 S.W.2d 326 (Tex.Civ.App. — Texarkana 1980, no writ hostory); *Robinson v. Excalibur Insurance Co.*, 598 S.W.2d 324 (Tex.Civ.App. — Houston 1980, writ ref'd, n.r.e.).

Mutual test, held that where the unloader told the driver where to park and then unload the truck, the unloader's "control over unloading operations show[ed] sufficient dominion and control over the truck to support the conclusion that [it] had temporary possession of the truck during unloading." Although the *McDaniels* court did not expressly state that it was applying Louisiana law — more accurately, *making* Louisiana law on this point — because the case was a diversity action brought in Louisiana and because, as here, the accident in *McDaniels occurred in Louisiana,* ► *the McDaniels* court was necessarily applying the law of that state. [9] Thus, *McDaniels* is squarely on point here.

And we hold it is mistaken. *McDaniels relied on two factual points to establish "possession": the fact that the unloader told the driver where to park and the fact that the unloading process involved entry into the trailer (using an electric forklift). In our view these facts, whether taken separately or together, do not suffice to establish such "dominion and control" as is indicative of "possession." First, construing the policy precisely, at the moment when the driver is told where to park, the unloading process has yet to begin, and it is possession during the unloading itself — not before or after — that renders an unloader a "borrower" under the amended, intentionally-restrictive clause. See Robinson,* 598 S.W.2d at 327-28 (rejecting argu-

---

[9] Two passages in the opinion indicate that the *McDaniels* court believed itself to be doing so: in discussing the general principles of insurance construction, the court cites Louisiana cases exclusively; 603 F.2d at 81; and the court devotes a footnote specifically to distinguishing one case "because it is the only Louisiana case cited," 603 F.2d at 81-2 n. 3.

ment that directing driver to spot where unloading will occur constitutes possession). More simply, merely directing someone to park in a particular place on your property does not, in any customary sense, constitute borrowing his vehicle — one scarcely views the proprietor of a parking lot as a "borrower."

Second, while the fact that the process of unloading neccitates entry into the vehicle does establish that the unloader is "using" the vehicle, it does not simultaneously establish the unloader's "possession." [10] If it did, then "One would only need to be an unloader to be a borrower" — an interpretation specifically rejected by the Texas courts in *Liberty Mutual, see* 556 S.W.2d at 245, and rejected by us today in favor of the *Liberty Mutual* test as developed by the Texas courts.

The facts of today's case satisfy the "use" prong of the *Liberty Mutual* test we adopt today, but fail to satisfy the "possession" prong. The actions alleged to constitute possession, or "dominion and control," are that Strachan's employees directed Sturgeon to a parking site and that Strachan's employees controlled Strachan equipment during an unloading process which involved entry into the truck. We find this evidence demonstrates "use" — in connection with unloading — but not "possession."

---

[10] An examination of the specific facts on which the *McDaniels* court relied demonstrates that rather than indicating control of the allegedly borrowed *truck,* they merely indicate control over *A & P's own equipment:* "A & P determined where along the dock the truck would be unloaded, who would unload it, what unloading equipment would be used, where the unloaded cargo would be placed on the dock, and when to release the truck to the driver." *McDaniels,* 602 F.2d at 81. Control of one's own equipment and personnel is irrelevant to the issue of whether one is "borrowing" a vehicle belonging to another in a loading/unloading situation.

The significance of our decision today for both the federal courts and those of Louisiana make it appropriate for us to set out some guidelines regarding what constitutes that control of a vehicle which will render a loader/unloader a "borrower" covered by this standard clause:

Control of a movable object intrinsically involves power to govern its location. In the instance of a vehicle — an object whose purpose is to provide transportation — "control" of the vehicle during any given period must include power to move it during that space of time. Thus, to have control of a vehicle during loading/unloading one must have the power to move the vehicle during the loading/unloading process itself.

We do not now attempt to compose an exclusive list of the various means by which a "borrower" may have the necessary power to move an allegedly borrowed vehicle; such mapping of the precise factual conours of "control" in the context of particular situations is an incremental endeavor more appropriate for the federal district courts and the courts of Louisiana than for our en banc discussion — which at this point would be unduly speculative.

We agree with the district court that "borrow is the correlative of loan," or more precisely, that the two terms in these standard insurance clauses must be construed in complementary fashion. Having determined that Strachan is not a "borrower" of the truck under the omnibus clause of Bankers and Shippers' policy, we accordingly hold that the vehicle was not "loaned" to it under the terms of American Mutual's

comprehensive policy. We remand to the district court for such proceedings as may be necessary in light of this holding.

REVERSED and REMANDED.

RUBIN, Circuit Judge, with whom POLITZ, TATE, JOHNSON and HIGGINBOTHAM, Circuit Judges, join, dissenting:

The intricate course this case has taken in the two years since the notice of appeal was filed, on April 5, 1982, should itself demonstrate why we ought rarely, if ever, to grant en banc rehearing of a diversity case. The majority overturns the *McDaniels* view of how a Louisiana court would read an insurance contract in the dim light of a Texas case. This is not the way we should handle the vehicles parked with us by diversity jurisdiction. If *McDaniels* was wrong, the Louisiana courts should and will inform us in due course. The Louisiana Supreme Court's denial of our certification indicates that it thought either that the *McDaniels* interpretation was correct, or that straightening us out was not worth the effort. That being so, I would simply vacate the en banc certification, reinstate the panel opinion, and resolve, once again, to resist hearing en banc cases that turn entirely on state law. *See Edwards Co., Inc. v. Monogram Industries, — F.2d — (5th Cir.1984), slip op. —; Nash v. Estelle,* 597 F.2d 513 (5th Cir.1979) (en banc), Rubin, J., dissenting.

APPENDIX "B"

Arthur W. STURGEON, Plaintiff,

Aetna Casualty and Surety Company,
Intervenor,

v.

STRACHAN SHIPPING COMPANY,
Defendant-Third-Party
Plaintiff-Appelle,

v.

BANKERS AND SHIPPERS INSURANCE COMPANY OF NEW YORK,
Third-Party Defendant-Appellant.

No. 82-3229
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Feb. 25, 1983.

In personal injury action against a shipping company, the latter third-partied insurance carrier for the owner driver of a flatbed tractor-trailer. The latter appealed from an adverse decision of the United States District Court for the Eastern District of Louisiana at New Orleans, Veronica D. Wicker, J. The Court of Ap-

peals held that though carriers for the trucking industry changed policy provision so as to restrict coverage to loaders and unloaders who were "a lessee or borrower of the automobile," shipping company to which flatbed tractor-trailer was presented for unloading in shipping company's unloading area and which had complete control over unloading process before releasing truck to its owner driver was "borrower" within coverage of owner driver's policy.

Affirmed.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GEE, RANDALL, and TATE, Circuit Judges.

PER CURIAM:

The facts of this case as found by the trial court are undisputed by either party. Pursuant to a contract, plaintiff Sturgeon, the owner-driver of a flatbed tractor-trailer, delivered a load of Texas cotton to defendant Strachan Shipping Company in New Orleans, presenting it for unloading at the time and place appointed. Arriving there, he handed over his bills of lading to the Strachan clerk, parked his rig where directed in Strachan's unloading area, and as directed readied its trailer for unloading by removing the tarpaulin and its fastenings. With this he was free to leave the area, since Strachan had complete contol over the loading process until it released the truck to Mr. Sturgeon. Although the trial court made no

specific finding on the subject, Mr. Sturgeon testified without dispute that only he had right of access to his tractor, the Strachan employee-witnesses agreed, and Mr. Sturgeon does not here contend that anyone but he could move the rig once he parked it. While Strachan forklifts were unloading the bales without driving onto the trailer, a bale fell on Mr. Sturgeon.

When he sued Strachan for his resulting injuries, Strachan third-partied Mr. Sturgeon's insurance carrier,[1] defendant Bankers and Shippers Insurance Company, claiming omnibus coverage as a "borrower" of the entire rig.

[1] Bankers and Shippers contends that while the Strachan unloaders may have been "permissive users" under the former standard insurance clause, they are not covered under the applicable revised clause limiting coverage to one unloading a hired vehicle only if he is a "borrower of the automobile . . . ." To put the matter in the words of counsel for Bankers:

"Intrastate Carriers are fully regulated and their rates set by the Interstate Commerce Commission.[31] Drivers, too, are fully regulated and must meet strict standards.[32] Neither has any economic interest under the scheduled rates in assuming any financial loss by the daily multitude of unknown loaders and unloaders

---

[1] Actually and inconsequentially for our purposes that of his employer, which provided his coverage.

"[31] (footnote omitted.)

[32] (footnote omitted.)

caused by their own negligence. Nor do they wish to pay the additional insurance premiums required by their insurers for such coverage to loaders and unloaders. They previously did cover all as 'permissive users.' [33]

"Consequently, insurance carriers for the trucking industry changed their policy provisions previously covering all loaders and unloaders as omnibus insureds eliminating that exposure, thus reducing the insurance premiums charged to the trucking industry, and thereby affecting the rates charged the public as set by the Interstate Commerce Commission and Department of Transportation. The provision now restricts coverage to loaders and unloaders who are: '(1) a lessee or borrower of the automobile . . .' [34] This attempt to restrict omnibus coverage by truckmen and their insurers is now being interpreted and is is the main issue in this appeal.[35]

[33] 95 A.L.R. 1122, Annotation, Risks within "Loading and Unloading" Clauses of Motor Vehicle Liability Insurance Policy; 7 Am.Jr.2d, Automobile Insurance, Sec. 89, pp. 396-97; 7 Appleman, Insurance Law and Practice, Sec. 4322, pp. 155-67 (1962); 7 Blashfield, Automobile Law and Practice, Sec. 315.7, pp. 588-91 (3rd Ed.1966); 45 C.J.S., Insurance, Sec. 829c(2), pp. 893-96; *Dairyland Insurance Co. v. Concrete Products Co.*, 203 N.W.2d 558 (S.C.Iowa 1973); The Defense Research Institute for "Loading and Unloading" Provisions of the Automobile Liability Insurance Policy (monograph 1965) 29 Insurance Counsel Journal 197 (1962) Brown and Risjord: Loading and Unloading; The Conflict between Tortious Adversaries; 13 Vanderbilt Law Review 903 (1960) Norman E. Risjord, Loading and Unloading.

[34] (footnote omitted.)

[35] 7 Am.Jur.2d (1980) Automobile Insurance, Sec. 206, Persons Covered, pp. 719-20; *Atlantic Mutual Insurance Co. v. Gulf Insurance Co.*, 596 S.W.2d 326 (Ct.Ap.Tex.1980)' *Bankers and Shippers Insurance Co. of N.Y. v. Lockamy, et al.*, 51 Md.App. 1, 440 A.2d 421 (1982); Black's Law Dictionary, 5th Ed.1979 — "Borrower" p. 167; *Liberty Mutual Insurance Co. v. American Employers Insurance Co., et al*, 556

"*McDaniels [v. Great Atlantic & Pacific Tea Co.,* 602 F.2d 78 (5th Cir.1979)] simplistically interpreted "borrower" as if it was the prior term 'permissive user' and made that law applicable without consideration of the historical development of the policy terms. The ill-conceived *McDaniels* decision truly hurts the trucking industry because it is one of the first appellate decisions under the new policy terms. How will jury charges be determined? What factors must be considered? How will trucking companies determine whether or not it wants to deliver to a particular dock to load or unload? What are the factors determining what constitutes a borrowing? How does a carrier determine whether or not it wants to accept the risk or the responsibility of a particular bill of lading? Under the *McDaniels* case all of these factors are unknown. Numerous claims are now being litigated — very expensively."

[2] Unfortunately for Bankers and Shippers, however, and whatever the merits of these arguments, we are not at liberty to consider them. *McDaniels,* to which the above passages refer, is a panel decision of this court, indistinguishable by us in any principled way. We, like the district court, are bound by it.[2] Since it is squarely against Bankers and Shippers arguments, the decision below must be

AFFIRMED.

S.W.2d 242 (Sp.Ct.Tex.1977); Protective Insurance Co. v. Coca-Cola Bottling Co. — Indianapolis, Inc., 423 N.E.2d 656 (Ct.App.Ind. 1981); *Robinson, et al v. Excalibur Insurance Co.,* 598 S.W.2d 324 (Ct.Civ.App.Tex.1980); *United States Fidelity & Guaranty Co. v. Federal Insurance Co.,* 79 Ill.App.3d 1130, 35 Ill. Dec. 425, 339 N.E.2d 259 (1979)."

[2] In justice to counsel for Bankers and Shippers, we note that they are aware of this circumstance and unsuccessfully sought en banc hearing of the appeal. Perhaps in part because of our strong aversion to such direct en banc proceedings before panel consideration of an appeal, this was denied.

APPENDIX "C"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ARTHUR STURGEON

versus

STRACHAN SHIPPING CO.

CIVIL ACTION NUMBER 79-954

SECTION L

Plaintiff, Arthur Sturgeon, is an independent, owner-operator-trucker. He entered into a contract with Pre-Fab Transit Co. (Pre-Fab), a motor common carrier, to haul freight for a fee of 74% of the gross receipts he collected. (Joint Exhibit 1). Pursuant to Pre-Fab's instructions, Sturgeon picked up a load of cotton in Brownsfield, Texas for delivery to Strachan Shipping Co. (Strachan) in New Orleans, Louisiana. Upon Sturgeon's arrival in New Orleans on March 2, 1979, he telephoned Strachan and was told to be at the Robin Street Wharf at 8:00 a.m. on March 4.

Pursuant to Strachan's instructions, plaintiff arrived at the wharf at the designated time; handed over his bills of lading to the Strachan clerk (Strachan Exhibit 1); drove and parked his flatbed truck in an area leased by Strachan in accordance with Strachan's directions and prepared his truck for unloading by taking off the chains and rolling up the tarpaulin.

Two Strachan employees, using forklifts, began unloading the cotton bales from the truck. As Sturgeon was picking up tie straps that had fallen on the ground around his truck, a bale of cotton, weighing approximately 500 lbs. fell and hit him in the back.

Strugeon filed this suit against Strachan for injuries he sustained during the unloading process. Strachan then filed a third-party action against Pre-Fab's insurer, Bankers and Shippers Insurance Co. of New York (Bankers), claiming it is an omnibus insured under the Bankers — Pre-Fab Policy. (Joint Exhibit 2). When Bankers refused to assume Strachan's defense, it sought indemnity as well as attorneys fees and costs expended in defense of Sturgeon's claims. Bankers also brought a claim for indemnity against American Mutual Insurance Co. (American Mutual), Strachan's insurer, claiming that American Mutual provided primary coverage under its automobile and comprehensive general liability policies with Strachan. (Joint Exhibits 3 and 4).

During the course of the trial, the principal demand was settled in the amount of $150,000.00 Under the terms of the settlement, American Mutual agreed to pay $75,000.00 immediately to plaintiff while the remaining $75,000.00 would be paid by either American Mutual or Bankers depending upon the decision of this Court as to which insurer provided coverage under the policies in question.

After careful consideration of the evidence adduced at trial, the briefs and arguments of counsel, and the law, the Court finds that Bankers provided primary coverage applicable to the loss sustained herein.

Bankers' policy extends coverage not only to the named insured but to any other person while loading or unloading a *hired automobile* with permission of the named insured if he is a "borrower of the automobile . . ." (Joint Exhibit 2). Bankers contends that Strachan was not a "borrower" under the policy. Although the policy itself does not define the term, the word "borrower," contained in an identical insurance policy clause, was defined in *McDaniels v. Great Atlantic and Pacific Tea Co.,* 602 F.2d 78 (5th 1979) and *Liberty Mutual Insurance Co. v. American Employers Insurance Co.,* 556 S.W.2d 242 (Tx. 1977), as one who has temporary possession of the vehicle with the permission of the owner.

In *Liberty Mutual* the Court concluded that the unloaders were not "borrowers" of the truck in question. The Court pointed out that the driver had not relinquished his keys to the unloaders and there was no evidence that they had possession and control over the movements of the truck and trailer rig during the unloading process. The Court held that merely proving that one had the right to remove goods from a truck is not evidence one was a "borrower" of the truck. The *McDaniels* Court found the evidence markedly different from the situation in *Liberty Mutual* — the defendants instructed the incoming driver where to park the truck and maintained control

over the truck until it was released to the driver at the end of unloading process. Thus, the Court held that defendant's control over the unloading operations showed sufficient dominion and control to support the conclusion that defendant had sufficient temporary possession of the truck to be considered a "borrower".

The evidence in this case reflects that Strachan employees told Sturgeon where to go and what time to be there, where to park his truck and when to take the chains and tarpaulin off. The evidence further reflects that at no time did defendant move the truck or board the truck since the cotton was unloaded by means of forklifts which never entered the truck. After Sturgeon had taken the chains and tarpaulin off of his truck, he was free to leave the area. Sturgeon had neither control over the unloading process nor control of his truck during the unloading process.

The facts in *McDaniels* are virtually identical to the facts of this case: Strachan had temporary possession of the truck during unloading; Strachan had complete control over the unloading process from the time the truck came onto the wharf until Strachan released the truck to the driver; Strachan determined where along the wharf the truck would be unloaded, who would unload it, what unloading equipment would be used, where the unloaded cargo would be placed on the dock and when to release the truck to the driver.

The only distinguishing factor between this case and *McDaniels is that Strachan's employees did not drive their forklifts onto Sturgeon's truck.*

Strachan employees testified that the only time forklifts are driven onto a truck for unloading purposes is where the physical makeup of the truck is such that unloading without boarding becomes difficult, as in a closed van-type truck. To distinguish McDaniels from this case for that reason would be absurd. It would equate possession and control with driving a forklift onto the bed of a truck.

I conclude that Strachan exercised as much control over the movement and possession of Sturgeon's truck and rig as was exercised in *McDaniels* and accordingly, Strachan was a "borrower" under Bankers' policy.

Bankers' contention that at the time of the accident, plaintiff had not yet relinquished control of his vehicle is without merit. The testimony clearly reflects that Strachan had begun the unloading process as soon as Sturgeon removed the tarpaulin. Plaintiff testified that the unloading process had been in progress for approximately five minutes before he was injured. The fact that Sturgeon was in the process of retreiving ties which had fallen on the ground does not indicate control and possession on his part.

Both Bankers and American Mutual allege they are exces insurers while the other is primary.

Bankers' contention arises from the wording of its Truckmen-Gross Receipts Endorsement to the policy (Joint Exhibit 2) which provides:

"3. *Excess Insurance:*
"With respect to . . . (3) any *non-owned automobile,* the insurance under this endorsement shall be excess over any other valid and collectible insurance, whether primary, excess or contingent, available to the insured. Otherwise, the insurance under this endorsement is primary insurance."

Bankers' policy defines a "non-owned automobile" as one "which is neither an *owned automobile* or a *hired automobile.*" A "hired automobile" is defined as "an *automobile* not owned by the named insured which is used under contract in behalf of, . . . the named insured."

For a vehicle to constitute a hired automobile, there must be a separate contract by which the vehicle is hired or leased to the named insured for his exclusive use or control. *Sprow v. Hartford Ins. Co.,* 594 F.2d 418 (5th Cir 1979). Here, Pre-Fab (Carrier) entered into a separate agreement with Sturgeon (Contractor) whereby Pre-Fab acknowledged "receipt" of the tractor-trailer involved herein "to be used by the Contractor in the performance of this contract with the Carrier." (Exhigit A, Joint Exhibit 1).

The truck in question was owned by Strugeon but was used under contract in behalf of Pre-Fab, making it a hired automobile under the terms of the policy. *Russim v. I.N.A.,* 421 F.2d 985 (6th Cir 1970). See *Wostal v. Travelers Ins. Co.,* 239 F.S. 395, 401 (SD Tx 1965). Thus, Bankers' policy provided primary and not excess coverage.

The basis for American Mutual's contention centers around the "Other Insurance" clause of its Business Auto Policy (Joint Exhibit 3) which provides:

> "For any covered auto . . . you don't own, the insurance provided by this policy is excess over any other collectible insurance."

This language is clear and unambiguous. Strachan did not own the vehicle in question and accordingly, American Mutual's Business Auto Policy only provides excess coverage.

Although American Mutual also provided coverage to Strachan under its Comprehensive General Liability Insurance policy (Joint Exhibit 4), it alleges that since Strachan was a borrower of the vehicle, coverage is excluded. The applicable clause, cited by Strachan, reads as follows:

> "*Exclusion*
>
> This insurance does not apply: . . .
>
> (b) to *bodily injury* . . . arising out of the ownership, maintenance, operation, use, loading or unloading of
>
> (1) any automobile . . . loaned to any insured, . . . "

American Mutual's policy does not define the word "loan."

"Loan" is defined as an agreement by which a person delivers a thing to another to use it according to the agreement, under the obligation on the part of the borrower to return it after he finishes using it. La. C.C. Art. 2893; Black's Law Dictionary, 4th Ed. "Borrow" implies a gratuitious loan and is defined as the solicitation and receipt from another, any article of property with the intention and promise to return it. Borrow is the correlative of loan. Since Sturgeon loaned his vehicle to Strachan for the purpose of unloading, American Mutual's policy excludes coverage. See *Mauterer v. Assoc. Indem. Corp.*, 332 So.2d 570 (La. App. 4 — 1976).

Bankers, under its policy with Pre-Fab, not only obligated itself to pay those damages the insured became legally obligated to pay, but took on the" . . . duty to defend any suit against the insured seeking damages on account of such *bodily injury. . ., even if any of the allegations of the suit are groundless. . .* " *(Joint Exhibit 2).*

Failure of an insurer to defend a suit as contemplated by the policy renders the insurer liable for all expenses incurred by the insured in defense of the action, including reasonable attorneys fees. Bandy v. Avondale Shipyards, Inc., 458 F.2d 900 (5th Cir. 1972); *Maryland Cas. Co. v. Marquette Cas. Co.*, 143 So.2d 249 (La. App. 4 — 1962).

Sturgeon is entitled to recover reasonable costs and attorneys fees expended by it in its defense of Strugeon's claims.

Let judgment be entered in accordance with the above and foregoing.

New Orleans, Louisiana, this 21st day of January, 1982.

_____

UNITED STATES DISTRICT JUDGE

MINUTE ENTRY

WICKER, J.

February 25, 1982

U.S. District Court
Eastern District of La.

ARTHUR W. STURGEON

VERSUS

STRACHAN SHIPPING COMPANY

CIVIL ACTION

NO. 79-954

SECTION: L

IT IS ORDERED that page 9 of the Court's written reasons, entered herein on January 25, 1982, is hereby CORRECTED in pertinent part, to-wit:

Strachan is entitled to recover reasonable costs and attorneys fees expended by it in its defense of Sturgeon's claims.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ARTHUR W. STURGEON

VERSUS

STRACHAN SHIPPING COMPANY

CIVIL ACTION

NO. 79-954

SECTION: L

JUDGMENT

The principal claim herein was settled in the amount of $150,000.00, it being agreed by all parties that $75,000.00 was to be paid to plaintiff, Arthur W. Sturgeon, by American Mutual Liability Insurance Company, with $6,750.00 of this amount to be paid to the intervenor, Aetna Casualty and Surety Company. It was further agreed by all parties that the remaining $75,000.00 would be paid as determined by the Court.

Now therefore, the Court having determined that third party defendant, Bankers and Shippers Insurance Company of New York, provided primary coverage under the insurance policies in question.

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of American Mutual Liability Insurance Company, and

However, in *McDaniels*, 602 F.2d 78, a panel of this Circuit, while professing to apply the *Liberty* against Bankers and Shippers Insurance Company of New York, in the amount of $75,000.00, of which $68,250.00 is to be paid to the plaintiff, Arthur W. Sturgeon, and $6,750.00 to be paid to the intervenor, Aetna Casualty and Surety Company.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, Strachan Shipping Company, and against Bankers and Shippers Insurance Company of New York, for costs and attorneys fees.

New Orleans, Louisiana, this 25th day of February, 1982.

Veronica D. Wicker
UNITED STATES DISTRICT JUDGE

APPENDIX "D"

28 U.S.C. § 1254. Court of Appeals, Certiorari, Appeal, Certified

Questions

Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:

1. By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or degree;

APPENDIX "E"

28 U.S.C. §1332. Diversity of citizenship; amounting controversy; costs

(a) The District Court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000.00 exclusive of interest and costs and is between —

1. Citizens of differenct states;

2. Citizens of a state and citizens or subjects of a foreign state;

3. Citizens of different states and in which citizens are subjects of a foreign state or additional parties; and

4. A foreign state defined in §1603 (a) of this title, as plaintiff and citizens of a state or of different states.

APPENDIX "F"

Persons Insured Provision of the Bankers & Shippers Insurance Company of New York's Liability Policy issued to Pre Fab Transit.

"ii. Persons Insured. Each of the following is an insured under this insurance to the extent set forth below.

c. Any other person using an owned automobile or a hired automobile with the permission of the named insured provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, but with respect of bodily injury or property damage arising out of the loading or unloading thereof, such other person shall be an insured only if he is:

1. A Lessee or a borrower of the automobile; or,

2. An employee of the named insured or of such lessee or borrower."

APPENDIX "G"

Arthur W. STURGEON,

Plaintiff,

Aetna Casualty and Surety Company, Intervenor,

v.

STRACHAN SHIPPING COMPANY,

Defendant-Third Party-Plaintiff-Appellee,

v.

BANKERS AND SHIPPERS INSURANCE COMPANY OF NEW YORK,

Third-Party Defendant-Appellant.

No. 82-3229

United States Court of Appeals,
Fith Circuit.

April 7, 1983.

Appeal from the United States District Court for the Eastern District of Louisiana.

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING
EN BANC

(Opinion February 25, 1983, 5 Cir.,
1982, 698 F.2d 798)

Before CLARK, Chief Judge, BROWN, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY, and HIGGINBOTHAM, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by the Court en banc without oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX "H"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3229

ARTHUR W. STURGEON,

Plaintiff,

AETNA CASUALTY & SURETY COMPANY,

Intervenor,

versus

STRACHAN SHIPPING COMPANY,

Defendant-Third Party
Plaintiff-Appellee,

versus

BANKERS & SHIPPERS INSURANCE
COMPANY OF NEW YORK,

Third Party Defendant-
Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before CLARK, Chief Judge, BROWN, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE JOHNSON, WILLIAMS, GARWOOD, JOLLY, and HIGGINBOTHAM, Circuit Judges.

ORDER:

A majority of the court en banc has determined that our order of April 6, 1983, granting rehearing en banc was improvidently issued. The cause is remanded to the panel for further proceedings. The previous panel opinion and judgment of the court based thereon shall remain vacated pending further order of the panel.

ENTERED FOR THE COURT:

_____

Chief Judge

APPENDIX I

Arthur W. STURGEON,

Plaintiff,

Aetna Casualty and Surety Company,

Intervenor,

v.

STRACHAN SHIPPING COMPANY,

Defendant-Third-Party Plaintiff-Appellee,

v.

BANKERS AND SHIPPERS INSURANCE COMPANY OF NEW YORK

Third-Party Defendant-Appellant.

No. 82-3229

United States Court of Appeals,
Fifth Circuit.

Dec. 12, 1983.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GEE, RANDALL and TATE, Circuit Judges.

PER CURIAM:

CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT TO THE SUPREME COURT OF LOUISIANA PURSUANT TO RULE 12, LOUISIANA SUPREME COURT RULES

TO THE SUPREME COURT OF LOUISIANA AND THE HONORABLE JUSTICES THEREOF:

I. STYLE OF THE CASE

The style of the case in which this certificate is made is *Arthur W. Sturgeon,* Plaintiff, versus *Strachan Shipping Company,* Defendant and Third-Party Plaintiff-Appellee, versus *Bankers and Shippers Insurance Company of New York,* Third-Party Defendant-Appellant, versus *American Mutual Liability Insurance Company,* Third-Party Defendant-Appellee, Case No. 82-3229, United States Court of Appeals for the Fifth Circuit, on appeal from the United States District Court for the Eastern District of Louisiana.[1]

II. QUESTIONS FOR THE SUPREME COURT OF LOUISIANA

It appears to the United States Court of Appeals for the Fifth Circuit that the above-styled diversity case in this Court involves questions or propositions

[1] An earlier opinion in the case, rendered by a panel of this Court, is reported at 698 F.2d 798 (1983), followed by an order granting en banc rehearing. Thereafter the Court en banc remanded the case to the panel for certification.

of law particularly appropriate for resolution by the Supreme Court of Louisiana. No precedent in the decisions of the Supreme Court of Louisiana appears to be controlling.

Under these circumstances, the United States Court of Appeals for the Fifth Circuit hereby certifies the following questions of law to the Supreme Court of Louisiana for instructions based upon the facts recited, pursuant to La.Sup.Ct.R. 12:

A. Under the following facts, was Strachan Shipping Company a "borrower" of the tractor-trailer under the unloading process and entitled to coverage under the trucker's insurance policy?[2]

[2] In pertinent part, the clause in question reads:

ii. Persons Insured. Each of the following is an insured under this insurance to the extent set forth below.

c. Any other person using an owned automobile or a hired automobile with the permission of the named insured provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, but with respect of bodily injury or property damage arising out of the loading or unloading thereof, such other person shall be insured only if he is;

1. A Lessee or a borrower of the automobile; or,

2. An employee of the named insured or of such lessee or borrower.

B. Was the tractor-trailer a "loaned" vehicle excluded from coverage under the Strachan Shipping Company's insurance policy?[3]

QUESTIONS CERTIFIED.

III. STATEMENT OF THE FACTS

On March 4, 1979, Arthur W. Sturgeon was under contract as an owner-driver of a tractor-trailer for Pre-Fab Transit Company. Under that agreement he was paid 74% of the gross receipts of any load that he hauled. His rig was a standard flat bed tractor-trailer. On that date he delivered a load of baled cotton to the Robin Street Wharf under a bill of lading to Strachan Shipping Company. He had never been there before. He was directed by a security guard through one of the doors into the large covered wharf, and down a pathway between stowed cargo to where the cotton was to be loaded.

The Strachan section of the Robin Street Wharf runs some 720 feet along the river. It is leased to Strachan by the City of New Orleans Dock Board. Arriving there, Sturgeon handed over his bills of lading to the Strachan clerk, parked his rig where directed in

[3] In pertinent part, the clause in question reads:

Exclusion
This insurance does not apply:

(b) to bodily injury . . . arising out of the ownership, maintenance, operation, use, loading or unloading of

(1) any automobile . . . loaned to any insured . . . .

Strachan's unloading area, and as directed readied the rig's trailer for unloading by removing the tarpaulin and its fastenings. With this he was free to leave the area, since Strachan had complete control over the unloading process until it released the truck to Mr. Sturgeon. Strachan's employees and equipment performed all loading and unloading operations, which is true for most flat bed loads. Unquestionably Strachan employees directed the tractor-trailer driver to stop where it was convenient for them to unload on their premises; however, Strachan employees could not operate, move or otherwise have any connection with the truck itself.

The truck driver gave his papers to the Strachan foreman who came up to his truck and told him to get ready for unloading. The bales of cotton are covered and secured by tarpaulin, chains and tie-downs and are truck equipment. Drivers must remove the tarpaulin, chains and tie-downs before the unloading operation can begin. Strachan's employees used a forklift-type vehicle with "squeezer" blades that lifted the bales from the flatbed from the side. Plaintiff removed the chains and binders holding the load, rolled up the tarpaulin for storage, and began picking up numerous tie-downs on and around his truck, some of which had fallen to the floor. While he was leaning over, picking up the last few ties, after two Strachan employees had started to unload his trailer, a bale of cotton fell upon his back causing him serious injury.

The entire record in this case, together with copies of the briefs of the parties and agreed certification in this Court, are transmitted herewith.

APPENDIX "J"

ARTHUR W. STURGEON
AETNA CASUALTY AND SURETY COMPANY

VS.

STRACHAN SHIPPING COMPANY

VS.

BANKERS AND SHIPPERS INSURANCE
COMPANY OF NEW YORK

No. 84-CQ-0030

In Re: CERTIFICATION FROM THE
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT NO. 82-3229.

February 3, 1984

Certification denied.

HTL
PFC
WFM
JLD
FAB
JCW

DIXON, C.J., would grant and answer both questions with "No."

Supreme Court of Louisiana
February 3, 1984

_____

Clerk of Court
For the Court

APPENDIX "K"

THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3229

ARTHUR W. STURGEON,

Plaintiff,

AETNA CASUALTY AND SURETY COMPANY,

Intervenor,

STRACHAN SHIPPING COMPANY,

Defendant-Third Party
Plaintiff-Appellee,

versus

BANKERS AND SHIPPERS INSURANCE
COMPANY OF NEW YORK,

Third Party Defendant-
Appellant.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING
(June 15, 1984)

Before CLARK, Chief Judge, BROWN, GEE RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY, and HIGGINBOTHAM, Circuit Judges*.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above titled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge
*Judge Davis did not participate in this decision.